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November 5, 2018

VIA ELECTRONIC FILING

The Honorable Jocelyn G. Boyd
Public Service Commission of South Carolina
101 Executive Center Drive
Columbia, South Carolina 29211

**RE: Friends of the Earth and Sierra Club v. SCE&G
Docket No. 2017-207-E**

**Request of the Office of Regulatory Staff for Rate Relief to South
Carolina Electric & Gas Company's Rates Pursuant to S.C. Code Ann. §
58-27-920
Docket No. 2017-305-E**

**Joint Application and Petition of South Carolina Electric & Gas
Company and Dominion Energy, Incorporated for Review and Approval
of a Proposed Business Combination between SCANA Corporation and
Dominion Energy, Incorporated, as May Be Required, and for a
Prudency Determination Regarding the Abandonment of the V.C.
Summer Units 2 & 3 Project and Associated Customer Benefits and Cost
Recovery Plans
Docket No. 2017-370-E**

Dear Ms. Boyd:

Enclosed for filing on behalf of South Carolina Electric & Gas Company and Dominion Energy, Inc. ("Joint Applicants") is the Joint Applicants' Brief in Support of Motion to Strike Exhibits to Amended Testimony of Elizabeth H. Warner.

If you have any questions, please advise.

Very truly yours,

K. Chad Burgess

KCB/kms
Enclosures

cc: All parties of Record in Docket No. 2017-305-E
All parties of Record in Docket No. 2017-207-E
All parties of Record in Docket No. 2017-370-E
(all via electronic mail only w/enclosure)

DOCKET NOS. 2017-207-E, 2017-305-E, AND 2017-370-E

IN RE: Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy, Incorporated for Review and Approval of a Proposed Business Combination between SCANA Corporation and Dominion Energy, Incorporated, as May Be Required, and for a Prudency Determination Regarding the Abandonment of the V.C. Summer Units 2 & 3 Project and Associated Customer Benefits and Cost Recovery Plans)
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**BRIEF IN SUPPORT OF
MOTION TO STRIKE
EXHIBITS TO AMENDED
TESTIMONY OF
ELIZABETH H. WARNER**

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Elizabeth Warner is the Vice President, Legal Services and Corporate Secretary at the South Carolina Public Service Authority (“Santee Cooper”). On November 1, 2018, the South Carolina Office of Regulatory Staff (“ORS”) presented Ms. Warner as a witness in the hearing of this matter, solely for the purpose of authenticating certain Santee Cooper records. Joint Applicants objected to the admission of nine documents that ORS sought to admit into evidence through Ms. Warner and requested an opportunity to submit this brief explaining why the ORS, through Ms. Warner, failed to meet its burden of establishing that these documents are admissible. The nine documents at issue are the following:

- **ORS00006973** is a document titled “VCS Units 2 & 3– Q2 President’s Meeting– June 30, 2016,” apparently addressed to Santee Cooper CEO Lonnie Carter, but with no listed date or author. The document provides questions and talking points for an upcoming meeting.
- **ORS00008486** is an undated document titled “Bechtel Report Action Plan,” with no listed author, that summarizes communications with SCE&G and Santee Cooper regarding the Bechtel Report and lists “Action Steps” for responding to the Report.
- **ORS00010055** is a February 13, 2017 memorandum from Mr. Carter to the Santee Cooper Board of Directors regarding Project status and financial issues facing Westinghouse.
- **ORS00011042** is a June 26, 2017 letter from Mr. Carter to Larry Hinz and Robert Hochstetler of Central Electric Power Cooperative, Inc. (“CEPC”) regarding negotiation of an extension to the Interim Assessment Agreement.
- **ORS00011063** is a May 3, 2017 email from Mr. Carter to Mr. Hochstetler of CEPC regarding access to information about the Project.
- **ORS00011588** contains meeting materials (including an agenda, draft minutes, and a memorandum from Michael Crosby) for a June 17, 2016 “Executive-Corporate Planning Committee” for Santee Cooper.
- **ORS00011823** is an April 11, 2017 email from Mr. Carter discussing recent financial announcements by Toshiba.
- **ORS00040162** is an undated, untitled document, apparently authored by Fluor, reflecting Fluor’s assessment of a modified project schedule from SCANA.

- **ORS00065013** is an October 21, 2013 memorandum from Mr. Carter to other Santee Cooper employees providing a summary of a September 18, 2013 meeting with SCANA and Consortium CEOs regarding the Project.

Ms. Warner was not the author of any of these nine documents. Instead, she essentially testified that these documents were found within the records of certain Santee Cooper personnel. See November 1, 2018 Uncertified Hearing Transcript (“Hearing Tr.”) at 69–77. For the reasons discussed below, Ms. Warner’s testimony fails to establish that these documents may be admitted into evidence. These nine documents are inadmissible hearsay and should be excluded under SCRE 802 and 805.¹

I. The South Carolina Rules of Evidence Apply to this Proceeding.

As an initial matter, during the hearing on November 1, 2018, Commissioner Ervin asked counsel to address whether the South Carolina Rules of Evidence govern the admissibility of evidence in this proceeding. The answer is yes. Indeed, the Commission’s rules and regulations expressly provide that “[t]he rules of evidence as applied in civil cases in the Court of Common Pleas shall be followed.” 10 S.C. Code Ann. Regs. 103-846(A). This regulation is consistent with the South Carolina Administrative Procedures Act, which provides that, in contested cases, “[e]xcept in proceedings before the Industrial Commission the rules of evidence as applied in civil cases in the court of common pleas shall be followed” in this venue. S.C. Code Ann. § 1-23-330(1). The present proceeding is a “contested proceeding” under the Administrative Procedures Act. See *id.* § 1-23-310(3) (defining “Contested case” as “a proceeding including, but not restricted to, *ratemaking*, price fixing, and licensing, in which the legal rights, duties, or

¹ Joint Applicants have also previously objected on relevance grounds to evidence regarding the prudence of prior Project decisions, which is not germane to the issues presently before the Commission. Joint Applicants preserve that objection with respect to the objected exhibits, but focus their present brief on the issue of hearsay.

privileges of a party are required by law to be determined by an agency after an opportunity for hearing”) (emphasis added).

The South Carolina Court of Common Pleas follows the South Carolina Rules of Evidence. *See* SCRE 101 (rules “govern proceedings in the courts of South Carolina”). Accordingly, the Rules govern here.

II. The Challenged Exhibits Are Hearsay.

The nine challenged exhibits are inadmissible hearsay under SCRE 802 and 805. Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” SCRE 801(c). The challenged exhibits either are or reflect communications to or from Santee Cooper employees. To the extent that ORS offers these communications for the truth of the statements contained therein, they fall squarely within the definition of hearsay, and it is ORS’s obligation to establish that the documents fall within an exception to the hearsay rule. *See, e.g., State v. Simmons*, 423 S.C. 552, 563, 816 S.E.2d 566, 572 (S.C. 2018). Ms. Warner’s testimony did not establish any such exception.

A. The Challenged Exhibits Do Not Fall Under the Business Record Exception.

ORS has argued that the proposed exhibits fall within the “business record” exception to the hearsay rule. That exception applies to (1) “[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge,” (2) “if kept in the course of a regularly conducted business activity,” (3) “and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness,” (4) “unless the source of information or

the method or circumstances of preparation indicate lack of trustworthiness.” SCRE 803(6). Even then, “subjective opinions and judgments found in business records are not admissible.” *Id.*

ORS cannot show the exception applies through general statements from Ms. Warner that she is familiar with the location of each challenged exhibit and how Santee Cooper stores its records. To the contrary, ORS must make a showing that *each specific exhibit* meets the elements of the exception. This includes evidence that the documents were created (1) pursuant to a business duty or obligation and (2) record regularly conducted business activity.

1. ORS Must Make a Specific Showing that Each Document Satisfies SCRE 803(6).

ORS cannot establish the applicability of SCRE 803(6) through general testimony about its proposed exhibits as a whole. Rather, and as other courts have explained, the fact-specific nature of the exception requires that ORS make a showing for each document individually. *See, e.g., New World Trading Co. Ltd. v. 2 Feet Productions, Inc.*, No. 11 Civ. 6219, 2014 WL 988475, at *1 (S.D.N.Y. Mar. 13, 2014); *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179, 2012 WL 85447, at *2–3 (E.D. La. Jan. 11, 2012); *see also MM Steel, LP v. Reliance Steel & Aluminum Co.*, No. 4:12-CV-1227, 2013 WL 6588836, at *1 (S.D. Tex. Dec. 16, 2013) (“Contrary to MM Steel’s suggestion, the emails do not become admissible simply by way of a general averment in a business records affidavit which covers thousands of pages of documents.”).²

This is true even for email. While South Carolina courts appear to have not addressed the issue in any published opinion, other courts have concluded that the simple fact that a company’s

² Aside from its provision that “subjective opinions and judgments found in business records are not admissible,” South Carolina Rule of Evidence 803(6) is substantively identical to Federal Rule of Evidence 803(6).

employees send and receive email does not mean that those emails qualify as business records under Rule 803(6). Put differently, “there is no across-the-board rule that all emails are admissible as business records.” *In re Oil Spill*, 2012 WL 85447, at *3; *see also United States v. Cone*, 714 F.3d 197, 220 (4th Cir. 2013) (“[I]t would be insufficient to survive a hearsay challenge simply to say that since a business keeps and receives e-mails, then *ergo* all those emails are business records falling within the ambit of Rule 803(6)(B).”); *It’s My Party, Inc. v. Live Nation, Inc.*, Civil No. JFM-09-547, 2012 WL 3655470, at *5 (D. Md. Aug. 23, 2012) (declining “to accept a blanket rule that emails constitute business records”); *Morisseau v. DLA Piper*, 532 F. Supp. 2d 595, 621 n.163 (S.D.N.Y. 2008).

Ms. Warner’s testimony included a number of broad, sweeping statements about the Santee Cooper records she had reviewed. *See* Hearing Tr. 62:23-63:12; 75:24-77:9. But a general statement that a group of documents “are authentic business records of Santee Cooper” and “kept in the normal course of business,” *id.* 76:25-77:2, is insufficient to establish the business records exception.

2. Ms. Warner’s Testimony Does Not Establish that Any of the Challenged Exhibits Document Satisfy SCRE 803(6).

Ms. Warner’s testimony also fails to make the requisite showing for any of the challenged exhibits that the business record exception applies. As noted above, it is not enough under SCRE 803(6) for a document to be kept in the regular course of business; it must also have been the “regular practice” of the business to create the document. Courts have interpreted this requirement to mean that there must have been a business “duty” or “obligation” to create the document. *See, e.g., United States v. Shah*, 125 F. Supp. 3d 570, 575 (E.D.N.C. 2015); *MM Steel, LP*, 2013 WL 6588836, at *1; *Park West Radiology v. CareCore Nat’l LLC*, 675 F. Supp. 2d 314, 333 (S.D.N.Y. 2009). It is insufficient for ORS to show that Santee Cooper employees

sent and kept emails or other documents as a “regular operation of the business.” *See Cone*, 714 F.3d at 220. Rather, ORS must offer “some evidence of a business duty to make and regularly maintain” the documents at issue. *United States v. Ferber*, 966 F. Supp. 90, 98 (D. Mass. 1997). ORS has not offered any such evidence, through Ms. Warner or otherwise, that the proposed exhibits were created pursuant to an official policy or some other duty requiring their creation.

Similarly, each document must have been created as part of *regular* business operations. The “business record exception is founded on the notion that such documents bear a sufficient degree of reliability ‘because they are created either through ‘systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.” *Giannone v. Deutsche Bank Sec., Inc.*, No. 03 Civ. 9665(WHP), 2005 WL 3577134, at *4 (S.D.N.Y. Dec. 30, 2005) (citations omitted). Documents created in reference to unique, isolated, or otherwise non-routine business matters do not fall within the exception. *See In re Oil Spill*, 2012 WL 85447, at *3.

Finally, with respect to emails, courts have noted that email “is typically a more casual form of communication than other records usually kept in the course of business, such that it may not be appropriate to assume the same degree of accuracy and reliability.”³ *It’s My Party, Inc.*, 2012 WL 3655470, at *5. ORS must show more than that Santee Cooper employees sent and received emails or other documents while at work. *See Cone*, 714 F.3d at 220; *In re Oil Spill*, 2012 WL 85447, at *3 (“[I]t is not enough to say that as a general business matter, most companies receive and send emails as part of their business model.”).

³ Relatedly, **ORS00008486** contains handwritten notes. Ms. Warner’s testimony does not even establish the identity of the notes’ author.

ORS has not offered evidence that the challenged exhibits possess these characteristics. Testimony by Ms. Warner that the documents were located in Santee Cooper files does not prove that the documents were created pursuant to a business policy and regular Santee Cooper business activity, such that their the Commission can assume their accuracy. Indeed, a review of the challenged exhibits indicate that they were either informal documents, created in response to exceptional, non-routine business circumstances, or both:

- **ORS00006973** is a clearly informal document, the purpose of which appears to be to provide Mr. Carter with talking points for a future joint meeting regarding the Project.
- **ORS00008486** is an undated document that describes “concerns,” “proposals,” and “action steps” related to the Bechtel Report. There is no indication that it was a regular business activity of Santee Cooper to make and maintain this document.
- **ORS00010055** is a memorandum prepared for a board meeting to discuss the exceptional financial issues facing Westinghouse in 2017. **ORS00011823** is an email discussing similar issues. Given the unique topics discussed in these documents, it does not appear that it was a regular business activity of Santee Cooper to make and maintain such documents.
- **ORS00011042** reflects negotiations with CEPC regarding an extension to the Interim Assessment Agreement. **ORS00011063** is an email between Carter and CEPC reflecting similar issues. Absent evidence that Santee Cooper regularly negotiated such agreements with CEPC (of which there is none), it does not appear it was a regular business activity of Santee Cooper to make and maintain such documents.
- **ORS00011588** contains materials discussing whether Santee Cooper should agree to the Fixed Price Option. Adoption of the Fixed Price Option was certainly not a “routine” business matter, and it thus does not appear it was a regular business activity of Santee Cooper to make and maintain such documents.
- **ORS00040162** reflects an assessment by Fluor of a proposed modified Project schedule by SCANA. The document appears informal in nature. There is no indication that an informal assessment of a significant business decision—changes to the Project schedule—would be a document created as part of Santee Cooper’s regular business activity. Furthermore, the document appears to have been created by Fluor, not Santee Cooper.
- **ORS00065013** discusses a meeting between high-level officers of Santee Cooper, SCANA, and the Consortium to discuss significant issues with the Project, including delays in submodule fabrication. There is no evidence that such a summary personally

drafted by Santee Cooper's CEO of such a high-importance meeting would be a document created as part of Santee Cooper's regular business activity.

In short, ORS has failed to present evidence demonstrating that the challenged documents are the type of systematic, regularly created documents that the business record exception contemplates.

B. The Challenged Exhibits Do Not Fall Within the Public Records Exception.

ORS has also argued that the challenged exhibits fall within the public records exception to hearsay in SCRE 803(8). That exception applies to "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report *provided, however*, that investigative notes involving opinions, judgments, or conclusions are not admissible." Even assuming that Santee Cooper qualifies as a public office or agency, Ms. Warner's testimony does not offer any evidence that the challenged exhibits reflect observations made "pursuant to duty imposed by law," as required by subpart (B). Moreover, as discussed below, the challenged exhibits include "opinions, judgments, or conclusions" that are not admissible, even if the documents themselves otherwise qualified as public records.

With respect to subpart (A), ORS has offered no evidence that the challenged exhibits set forth the activities of Santee Cooper, rather than just those of individual Santee Cooper employees. Put differently, the public records exception does not create a blanket hearsay exception for any document created by a public employee. As multiple courts have held, informal communications from individual employees, or draft documents not formally adopted by the public office, may not be records "of the office or agency" for the public record exception to apply. *See Figures v. Bd. of Pub. Utilities of City of Kansas City, Kan.*, 967 F.2d 357, 360

(10th Cir. 1992); *United States v. Gray*, 852 F.2d 136, 139 (4th Cir. 1988); *Smith v. Pfizer Inc.*, No. 3:05-0444, 2010 WL 1963379, at *6 (M.D. Tenn. May 14, 2010) (declining to apply public records exception to email that “reflects the opinion of a single FDA official, and the statements are not a record of ‘activities’ undertaken by the FDA”).

Ms. Warner’s testimony did not establish that the challenged exhibits fairly set forth the activities of Santee Cooper. The challenged exhibits include documents which may or may not be drafts, (ORS00006973, ORS00008486, ORS00040162) and emails or correspondence from individual employees or officers, such as Lonnie Carter (ORS00011042, ORS00011063, ORS00011823). ORS has not shown that these documents are fairly attributable to Santee Cooper as a public entity. The same is true for the other exhibits—ORS has not offered evidence that the documents represent the official position of or have been approved by Santee Cooper. Generic testimony from Ms. Warner that documents are “a record of Santee Cooper and a public record,” Hearing Tr. 69:7–8, is insufficient.

C. The Challenged Exhibits Contain “Subjective Opinions and Judgments.”

There is a separate reason why none of the challenged exhibits can fall under either the business record or public records exception: they are laden with the subjective opinions and judgments of Santee Cooper employees and other individuals. This content precludes application of either SCRE 803(6) or 803(8), even if the other elements of the exceptions are satisfied. SCRE 803(6) flatly states that “subjective opinions and judgments found in business records are not admissible.” Likewise, SCRE 803(8) provides “that investigative notes involving opinions, judgments, or conclusions are not admissible.” *See also Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 411, 764 S.E.2d 249, 253 (Ct. App. 2014) (“Accordingly, reports

containing opinions, judgments, or conclusions are outside the scope of Rule 803(8)'s public records exception.").

It is beyond the scope of this brief to document every opinion or judgment contained in the challenged exhibits. But a cursory review of each exhibits shows that such inadmissible opinions and judgments are inherent in each:

- **ORS00006973** contains numerous opinions and judgments by its author relating to construction issues (*e.g.*, "From a CEOs perspective . . . I believe everything above boils down to the following . . .").
- **ORS00008486** contains various opinions and judgments on the proper use of the Bechtel Report.
- **ORS00010055** contains various opinions and judgments from Mr. Carter regarding "pertinent" facts relating to Westinghouse's financial status.
- **ORS00011042** contains opinions and judgments from Mr. Carter about a proposed extension of the Interim Assessment Agreement.
- **ORS00011063** contains various opinions and judgments from Mr. Carter about the project schedule.
- **ORS00011588** discusses the conclusions of previous studies and discussions regarding the Fixed Price Option.
- **ORS00011823** contains opinions from Mr. Carter on the financial status of Toshiba. ("We continue to be concerned over Toshiba's financial straits.").
- **ORS00040162** contains opinions and judgments from Fluor about an achievable schedule for the Project.
- **ORS00065013** contains various opinions and judgments from Mr. Carter regarding a September 18, 2013 meeting with the Consortium and the Consortium's ability to manufacture submodules for the project.

These judgments and opinions are inadmissible as hearsay regardless whether the business records or public records exceptions otherwise apply, and are another reason why the Commission should not permit admission of the challenged exhibits.

D. The Challenged Exhibits Are Not Admissions of a Party-Opponent.

ORS has alternatively argued that the challenged exhibits are offered as statements of a party-opponent, on the theory that Santee Cooper is a party-opponent to ORS in this proceeding because it engaged in a joint venture with SCE&G. *See* Hearing Tr. 80:19-25. Under SCRE 801(d)(2), a statement is not hearsay if it “is offered against a party and is . . . (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship”

First, ORS has not offered evidence that a principal-agent relationship existed between SCE&G and Santee Cooper. An agency relationship requires evidence that the principal intends the agent to act on its behalf and that the agent has accepted the authority and acted on it. *See, e.g., Courtney v. Remler*, 566 F. Supp. 1225, 1230 (D.S.C. 1983). Aside from asserting that SCE&G and Santee Cooper were in a joint venture with respect to the Project, ORS has not established the requisite elements of a principal-agent relationship, such that SCRE 801(d)(2)(D) might apply.

Even assuming Santee Cooper is an agent of SCE&G (something ORS has not proven), ORS has not offered evidence that the challenged exhibits contain statements “concerning a matter within the scope of the agency.” Not every statement of an agent is admissible against the agent’s principal. *See, e.g., Precision Piping & Instruments, Inc. v. E.I. du Pont de Nemours & Co.*, 951 F.2d 613, 619–20 (4th Cir. 1991) (statement by employee relating to area outside employee’s scope of employment not party-opponent admission against employer). In practical terms, the fact that Santee Cooper and SCE&G were in a joint venture should not mean that *any* statement by *any* Santee Cooper employee is attributable to SCE&G. This is particularly true for internal Santee Cooper communications. Even if those communications relate to the new nuclear development, Ms. Warner’s testimony did not establish that they were communications in

furtherance of the joint venture, rather than communications in assessing Santee Cooper's own interests with respect to the Project. Furthermore, some documents (**ORS00040162**, **ORS00011063**) contain statements from individuals who are not Santee Cooper employees.

E. The Challenged Exhibits Contain Hearsay Within Hearsay.

As a final matter, many of the challenged exhibits contain multiple layers of hearsay—for example, descriptions of previous communications the author had with other individuals:

- **ORS00008486** discusses the substance of a prior conversation between Mike Baxley and Al Bynum.
- **ORS00006973** summarizes various statements made at a June 23, 2016 meeting with SCANA employees and representatives from Westinghouse and Fluor.
- **ORS00010055** is a February 13, 2017 memorandum from Mr. Carter that discusses both the CORB and Bechtel Reports.
- **ORS00011042** references prior discussions with CEPC, as well as a previous Santee Cooper Board meeting.
- **ORS00011063** includes a May 1, 2017 email from Rob Hochstetler of CEPC describing a prior conversation he had with Michael Crosby.
- **ORS00011823** is an April 11, 2017 email from Mr. Carter discussing an earnings report from Toshiba.
- **ORS00065013** is an October 21, 2013 memorandum from Lonnie Carter summarizing a September 18, 2013 meeting with the Consortium.

Accordingly, even if the exhibits themselves fall within a hearsay exception, that exception may not cover the additional hearsay contained within the exhibits. For the exhibits to be admissible, Santee Cooper must establish that *both* (1) the communication discussed in the exhibit and (2) the exhibit itself conform with an exception to the hearsay rule. *See* SCRE 805.

III. Conclusion

Ms. Warner's amended direct testimony establishes only that the challenged exhibits came from Santee Cooper. As such, ORS has not established that the exhibits fall under any

exception to the hearsay rule. For those reasons, the Court should sustain Joint Applicants' objections to the nine challenged exhibits.

Respectfully submitted,



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